No. 12944

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

McNAIR REALTY COMPANY, a Corporation,
Appellant,

vs.

GAMBLE-SKOGMO, INC., a Corporation,
Appellee.

GAMBLE-SKOGMO, INC., a Corporation,
Appellant,

vs.

McNAIR REALTY COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLEE, McNAIR REALTY COMPANY, On Cross Appeal of GAMBLE-SKOGMO, INC.

Upon Appeal From the District Court of the United States for the District of Montana

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McNair Realty Company.

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I.

STATEMENT OF THE CASE

In this portion of our answer brief to the opening brief

of Gamble-Skogmo, Inc., on its appeal herein, we desire to point out to the Court as briefly as possible certain matters which do not appear in Appellant's statement of the case and which we believe have a direct bearing upon the rights of both Appellant and this Appellee on the appeal of Gamble-Skogmo, Inc.

At the outset we desire to point out to the Court the following facts which have a direct bearing upon the right of Gamble-Skogmo, Inc. to appeal from the judgment of the Court entered on March 14th, 1951. (R. pp. 58-60).

By its Findings of Fact (R. pp. 44-55) the lower court found, (a) that Appellant was indebted to Appellee for delinquent rental arising out of net retail sales of the farm unit during the period January 1st, 1947 to December 27th, 1949. (R. pp. 52, 53); (b) that during said period Appellant failed and refused to account to Appellee for such net retail sales, (R. p. 52); (c) that by reason of such defaults the lease was subject to termination by Appellee on October 3rd, 1949 and at all times thereafter. (R. pp. 53, 54); (d) that on October 3rd, 1949, Appellee elected to terminate the lease. (R. p. 54).

By its Conclusions of Law (R. pp. 55-57), the lower court concluded: (1) That Appellant is indebted to Appellee in the amount of $5,177.70 unpaid rental, (R. p. 55); (2) that Appellee is in default with respect to the covenants of the lease relating to the payment of rental and the quarterly accountings to Appellee, (R. p. 56); (3) that Appellee "is entitled to a judgment and declaration of this Court that said lease is terminated and forfeited and that defendant is entitled to the immediate

possession of the premises described in said lease *unless the plaintiff shall pay to defendant* within fifteen (15) days after the entry of these Findings and Conclusions and service thereof upon the counsel for the Plaintiff the sums set forth in Conclusions Numbered I and IV hereof, in which event the said plaintiff shall be entitled to be relieved of the termination and forfeiture of said lease which has accrued by reason of the defaults set forth herein," (R. p. 56); (4) "Judgment shall not be entered herein until after the expiration of fifteen (15) days from the entry of these Findings and Conclusions, during which period *plaintiff may, if it so elects,* make the payments to defendant required under these Findings and Conclusions, and the Court hereby retains jurisdiction of the cause for the purpose of entering a proper judgment upon the expiration of such period." (R. p. 57).

The Findings and Conclusions of the lower court were filed and served February 24, 1951. (R. p. 57). On March 6th, 1951, the Appellant made the following tender to Appellee. (R. p. 66):

> "To: McNair Realty Company and H. C. Hall and Edw. C. Alexander, its attorneys:
>
> *"Pursuant to and in conformity with* the Findings of Fact and Conclusions of Law heretofore filed in the above-entitled matter, we hand you herewith the sum of Five Thousand Nine Hundred Thirty-one and 18/100 ($5,931.18) Dollars representing compensation to be paid by Plaintiff to Defendant; the sum of Three Hundred Sixty-two and 25/100 ($362.25) Dollars representing costs and the further sum of Eleven and 77/100 ($11.77) Dollars which we calculate to be the interest due in this matter from the date of entry of Findings of Fact and Conclusions of Law up to the present date."

The tender was acknowledged and refused. (R. p. 66).

Thus we find that the Appellant, Gamble-Skogmo, Inc., Appellant here has voluntarily accepted the condition set forth in the Findings and Conclusions, by which it was permitted to continue in possession of the leased property and thus relieved of the termination of the lease which the Court had found. Pursuant to the voluntary acceptance by Appellant of this condition, the Court entered its judgment on March 14th, 1951, as follows, (R. pp. 58-60):

> "3. That by tender on March 6th, 1951, of the sum of $6,305.20, representing unpaid rental plus interest and costs of this suit, with interest on all of said sums from February 24th, 1951 to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease."

It is believed by the Appellee that by thus acquiescing in the Findings of Fact and Conclusions of Law, and meeting the conditions therein imposed and in such manner procuring a favorable judgment upon the matter of relief from forfeiture of the lease, the Appellant has foreclosed itself from appealing from that judgment, and argument will be presented upon that matter.

While the statement appearing in the brief of Appellant, Gamble-Skogmo, Inc., with reference to the sales of the farm unit or department is extremely sketchy, we do not here intend to impose upon this Court by any lengthy exposition of the evidence. The Findings of the Court

with respect to this matter are supported by the overwhelming weight of the evidence. It appears to Appellee that Finding No. IV of the lower Court, (R. pp. 48-51) is conclusive upon this appeal. That Finding is as follows:

"IV.

"Commencing on or about January 1st, 1947, and continuing to on or about the 23rd day of December, 1949, the plaintiff made net retail sales of farm equipment and other associated items in a total amount of $258,883.49. With respect to such net retail sales the Court specifically finds that all thereof were 'had and obtained' upon the store premises located at 521-523-525 Central Avenue in the City of Great Falls, Montana. Upon this matter the Court finds from the evidence:

That in the operation of its chain of stores the plaintiff sets up various units or departments. From the record herein it appears that there are five of such departments. Apparently some stores have, within their operations, all five departments. Others have one or more. The departments so maintained are as follows:

Unit 1—The department store selling general merchandise;

Unit 2—Food dispensing;

Unit 3—Drug Store;

Unit 4—(Not shown in the record);

Unit 5—Farm implements, parts and repairs.

At the outset the only department placed in operation in Great Falls was Unit 1, the department store. Thereafter Unit 2 was installed and was in operation at the time of trial. Unit 5 was installed on or about January 1st, 1947, and continued in operation until December 23rd, 1949, when it ceased operations.

That an analysis of the methods used in conducting the store operations discloses that the sales made by the Farm Store were as much 'had and obtained' upon the premises at 521-523-525 Central Avenue as any other

sales made by the store in the usual course of its business operations. Thus it appears that:

(1) There was but one 'Gambel Store' operating in Great Falls, and there was but one manager of the entire operations of that store.

(2) This one store was divided into three units or departments, each of which was a part of the 'Gamble Store.'

(3) The manager of the 'Gamble Store' received a commission on all sales made in the three departments of the store.

(4) The business office, and the office of the manager was located in the building at 521-523-525 Central Avenue.

(5) In this business office all of the accounting and bookkeeping for the three departments was handled.

(6) All petty cash used by the farm department in making change was supplied by the business office.

(7) All moneys received through sales made in the farm department were deposited with the business office either immediately or at the close of the day's business.

(8) All sales records whether on credit or for cash were kept in the business office.

(9) All credit sales were approved by the business office.

(10) All contracts for conditional sales were approved by the business office.

(11) There was but on bank account maintained for the entire store operation. All moneys received from sales in all departments went into that bank account. All salaries were paid from that bank account.

(12) All other expenses of operating the farm department were paid out of the business office.

(13) The only telephone available was the telephone in the premises at 521-523-525 Central Avenue. There was no other telephone listed for Gamble's Store.

(14) In all advertising, whether for farm implements or otherwise, the prospective customer was directed to go to the store at 521-523-525 Central Avenue, and the only telephone number given was the telephone at the store on Central Avenue.

(15) The advertisements offered and received in evidence all disclose that farm implements were invariably advertised as being for sale at the Central Avenue Store.

(16) Brochures and other pamphlets advertising farm machinery and implements were kept in the Central Avenue Store for the benefit of prospective customers.

(17) When, in response to a newspaper advertisement or otherwise, a customer came into the store and evinced an interest in farm implements he was then directed to the store across the alley.

(18) From the advertisements introduced in evidence as exhibits 8 to 15, inclusive, it appears that farm implements were actually displayed and sold in the 'downstairs' store of the premises at 521-523-525 Central Avenue. (Exhibits 8 to 15 are certified to this Court.)

(19) Actually a tractor was displayed for sale on the main floor of the Central Avenue premises.

(20) As conclusively appears from the store records introduced in evidence as exhibits 27 and 28, all sales and expenses of departments 1, 2 and 5 were considered as the sales and expenses of 'Gamble's Store'; although for bookkeeping purposes the sales were separated and a bookkeeping charge made against such sales in order 'to see if any particular unit is operating at a loss.'

(21) There was no complete separation of the farm unit or department from the other store operations. Indeed, the operations were so intermingled as to make it impossible to separate one from the other. Thus, while the premises across the alley were called the 'farm store,' nevertheless it has at all times been also used as a warehouse for furniture and other items sold directly from the premises on Central Avenue."

It is true that in 1946 the Appellant expended a considerable sum of money in remodeling the basement and other portions of the leased premises, and also installed new fixtures. (Tr. pp. 100, 102). Under the provisions of the lease the fixtures remain the property of Appellant. (R. p. 18). The remodeling was done by Lessee at its election under the lease, and not by reason of any requirement of Appellee. The lease is explicit with respect to the repairs and alterations to be done by Lessor. (R. pp. 12-14). Under such provisions the Appellee expended approximately $13,000.00 for the benefit of Appellant. (R. p. 393). How, under any circumstances, the expenditures made by Appellant in 1946 would have any bearing upon its breach of the lease in 1947, 1948 and 1949 is not clear. Certainly, if any benefit accrued to Appellee by reason of such remodeling, a much greater benefit, in the ratio of 98% to 2% accrued to appellee.

The suggestion is made that certain tenders were made by appellant to appellee during negotiations carried on by them during the period October 24 to 28, 1949. (Brief p. 13). Evidence relating to such negotiations all went in under objections made by counsel for appellee that such negotiations, including the so-called tenders were of a compromise nature. (R. p. 298).

Indeed, such objection was made long before the objection appearing at page 298. In its opinion the lower court said with respect to such evidence. (R. pp. 36, 37):

> "The negotiations for a compromise of the difficulties the parties were encountering fills a good part of the transcript in this case; objections were made to the introduction of evidence relating to this attempted com-

promise, and the evidence was allowed to be taken subject to objection; the court has gone over carefully the evidence of this effort to effect a compromise, which ended in failure, and is now of the opinion that all evidence relating to this subject should be excluded from the case, and such is the order of court herein. It would appear from the provisions of the statute and authorities (R. C. M. 1947, 93-2201-3) that evidence of compromise negotiations should not be admitted. Whatever the agreements or disagreements of the parties were in respect to the proposals of compromise it is in evidence that no settlement occurred. (Huffine v. Lincoln, 53 Mont. 474.) In the strict sense of the word there does not appear to have been any material independent facts disclosed not having some relation to the negotiations for compromise."

Aside from the anomalous situation of appellant now relying on evidence that was stricken by the Court on its own objection, it is apparent that, under appellant's theory in the lower Court that there was actually no tenders made at any time prior to March 6th, 1950. (R. pp. 199, 201, 202, 204.)

We desire to point out to the Court that the entire record upon the questions raised in this appeal is not before the Court. Much testimony has been omitted which would give support to the Findings and Conclusions of the lower Court. A considerable part of the record here presented consists of testimony which was objected to and the objection sustained by the lower Court. (R. pp. 36, 37). All of such evidence now appears in the record at the request and designation of the appellant. What purpose it here serves is not apparent.

II.
SUMMARY OF ARGUMENT

1. By making tender to the McNair Realty Company of the sum of $6,305.20 on March 6th, 1950, (R. p. 66), as required by the Findings and Conclusions of the lower Court, (R. pp. 54, 55, 56, 57), as a condition precedent to relief from the forfeiture and termination of the lease, and thus obtaining a judgment relieving it from such termination, (R. p. 59), the appellant has acquiesced in and accepted such judgment and has voluntarily performed such condition and may not now appeal therefrom, and its appeal herein should be dismissed.

2. The Appellant herein does not specify as error the making by the lower Court of any of its Findings of Fact or Conclusions of Law. Such Findings and Conclusions are the basis for the judgment entered herein. The so-called Specifications of Error in Appellant's brief are in reality a summary of argument with which is intermingled matter which is purely and simply argumentative. (Brief pp. 18-20).

3. The Findings of Fact and Conclusions of Law of the Lower Court with respect to the defaults of the Appellant for failure to account and for failure to pay additional rental due to appellee, and with respect to the termination of the lease, are amply supported by the evidence, are not clearly erroneous, and should not be set aside by this Court.

4. The sales of farm implements and equipment were "had and obtained" upon the premises covered by the lease of December 27th, 1943, and were within the provisions

of the lease requiring a quarterly accounting and payment of 2% of net retail sales as additional rental.

5. The appellee did not accede to a construction of the lease "to the effect that farm sales are not included within the rental and accounting provisions of the lease." In fact, the appellee made demand after demand that appellant account for such sales and pay the rental due thereon. (R. pp. 189, 192, 261, 267, 268, 269, 270, 273, 280, 348, 349).

6. There was no "tender" made by appellant to appellee of delinquent rentals at any time prior to March 6th, 1951. At best there were no offers to pay which were conditioned (a) upon the appellee agreeing that the lease of December 27th, 1943 should be re-instated; or, (b) that payment would be made if the lower Court ordered it.

7. The appellee has not waived its right to claim an accounting for farm unit sales and the 2% rental on farm sales, nor has it waived its right to claim a termination of the lease. The lease expressly provides that appellee has the right to collect rent upon the premises without prejudice to its right to claim a termination of the lease for a breach of the covenants thereof. (R. p. 19). In no event did the appellee accept payment of rent of any kind which became due after its termination of the lease.

8. The appellee did not demand a percentage on sales of the farm unit to October 19, 1949.

III.

ARGUMENT

A. The Appeal Herein Should Be Dismissed.

By its Findings of Fact the lower Court found and

declared that the appellant had not accounted to the appellee for sales from its farm unit for the period January 1, 1947 to December, 1949, and that it had not paid the 2% additional rental for such sales. It further found that such sales were "had and obtained" upon the premises covered by the lease. It further found that by reason of such defaults the lease had been breached and was subject to termination and that notice of termination had been given. (R. pp. 48-54). The lower Court then concluded, (R. p. 56), that McNair Realty Company "is entitled to a judgment and declaration of this Court that said lease is terminated and forfeited and that defendant is entitled to the immediate possession of the premises described in said lease *unless* plaintiff shall pay to defendant within fifteen (15) days after the entry of these Findings and Conclusions" an amount equal to the delinquent rental plus interest and all court costs.

In its complaint the appellant alleged, (R. p. 6), "that if this Court adjudges that the plaintiff has failed to comply with the provisions of said written lease . . . the plaintiff is ready, willing and able to make full compensation to the defendant for such failure if any exists."

On March 6th, 1951, pursuant to the requirements and conditions of the decree, the appellant tendered to appellee the sum of $6,305.20. The tender was in writing and recited that it was made "Pursuant to and in conformity with the Findings of Fact and Conclusions of Law heretofore filed in the above entitled matter." (R. p. 66).

Thereafter, on March 14, 1951, judgment was entered by the Court. The judgment recited, (R. p. 58), that "it now appearing to the Court that the plaintiff above named

has tendered to the defendant the sum of $6,305.20 *as required* by said Findings and Conclusions as compensation to defendant, other than by way of attorneys' fees,

"NOW, THEREFORE, It Is Hereby Decreed, Adjudged and Declared:

"3. That by the tender on March 6, 1951, of the sum of $6,305.20, representing unpaid rental plus interest and the costs of this suit, with interest on all of said sums from February 24th, 1951 to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease."

Nowhere in its brief does the appellant suggest that either the judgment or the Findings or Conclusions were erroneous in the above respects. Indeed, the brief claims the right to "relief from forfeiture and termination of that lease," by reason of the tender of March 6th, 1951. (R. pp. 16, 40-42).

The appellant, after the filing of the Findings of Fact and Conclusions of Law had two courses open to it, viz: (a) It could comply with the condition precedent to relief from forfeiture and pay the money required; (b) it could refuse to comply and appeal to this Court. Certainly, it could not do both for one is wholly inconsistent with the other.

Harrington v. B. A. & P. Ry. Co.,
39 Mont. 22, 101 Pac. 149;

Conlin v. Southern Pac. Ry. Co.,
40 Cal. App. 743, 182 Pac. 71.

By the tender of $6,305.20, in "conformity" with the

Findings and Conclusions, the appellant obtained a judgment relieving it from the termination of the lease and permitting it to remain in possession of the leased premises. (R. p. 59). Having performed the condition and benefited thereby it may not now appeal.

3 C. J. 666, citing:

Bashore v. Tulare County,
152 Cal. 1, 91 Pac. 801;

Evans v. Noble,
..... Iowa ....., 107 N. W. 1105;

Buena Vista County v. Iowa R. Co.,
55 Iowa 157, 7 N. W. 474;

Harrington v. B. A. & P. Ry. Co.,
39 Mont. 22, 101 Pac. 149;

Kraus v. Kraus,
74 N. J. Eq. 417, 70 Atl. 305;

Wilson v. All,
86 S. C. 586, 68 S. E. 824;

Lynchburg Tel. Co. v. Booker,
103 Va. 594, 50 S. E. 148;

Flanders v. Merrimac,
44 Wis. 621.

As was pointed out by the Supreme Court of Iowa, in the Buena Vista County case, supra, (7 N. W. 474):

> "The plaintiff cannot accept the benefits of the judgment, so far as favorable to it, and, at the same time prosecute an appeal from the judgment."

For the purpose of this appeal the tender made by the appellant was the equivalent of payment, for by that tender the appellant benefited to the same extent as though the tender had been accepted. Had the appellee accepted the payment tendered to it by the appellant it seems elementary that there could be no appeal from the judgment

by Gamble-Skogmo because the case would then have become moot. Certainly the same result must follow here where the tender is equivalent to payment. The delinquent rentals have been paid and appellant is in possession. It is out of the farm implement business (R. p. 83). The appeal of Gamble-Skogmo herein should be dismissed.

United States v. Alaska Steamship Co.,
253 U. S. 113, 64 L. Ed. 808;

Borchard, Declaratory Judgments, p. 61.

B. The Appellant Does not Specify as Errors the Making of any of the Findings or Conclusions.

As we have heretofore pointed out there are no specifications of error set forth by the appellant with respect to the Findings of Fact and Conclusions of Law. As a matter of fact, the so-called specifications of error appear to be more in the nature of a Summary of Argument than anything else.

Rule 20 (d) of this Court provides:

> "In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

The judgment and decree here involved is based upon the Findings of Fact and the Conclusions of Law. The Findings are based upon the evidence and the Conclusions upon the Findings. If the lower Court committed no error in making its Findings of Fact and Conclusions of Law then, if the Judgment follows them there can be no error in the Judgment.

Western Securities Co. v. Spiro,
62 Utah 823, 221 Pac. 856, 859;

Esselstyn v. Holmes,
42 Mont. 507, 515, 114 Pac. 118.

In United States v. Cushman, CCA 9, 136 Fed. (2d) 815, it was held that under rule 20 of this Court, where appellant did not specify the trial court's findings as error, the question of the sufficiency of the evidence to support the findings was not raised.

See also:

Simons v. Davidson Brick Co.,
CCA 9, 106 Fed. (2d) 518.

Clearly so-called specifications 3, 4, 5, 7 and 8 are not specifications of error at all under the rule. So-called specification 9 appears to be directed at the sustaining by the Court in its opinion, (R. pp. 36, 37), of an objection to the introduction of evidence made by counsel for appellant himself. This leaves only specifications 1, 2 and 6 which need to be considered at all. Such specifications relate only to the judgment; are general in their nature; and, simply state that the judgment is erroneous "in so far" as it adjudges various matters. Such specifications are entirely improper.

See:

Humphreys Gold Corp. v. Lewis,
CCA 9, 90 Fed. (2d) 896.

Under such circumstances it would appear that there is nothing here presented for the review of this Court.

C. The Findings of Fact and Conclusions of Law are amply supported by the evidence; are not clearly erroneous and should not be set aside by this Court.

In this and the following subdivisions of this brief, we shall assume, for the purposes of argument, that the ap-

pellant, Gamble-Skogmo, has the right to appeal from the judgment entered on March 14th, 1951, notwithstanding its tender of the money required by that judgment to be paid. We shall also assume that the specifications of error set forth in Appellant's brief are sufficient to permit a consideration of the evidence by this Court. At the outset we believe that it should be called to the attention of the Court that all of the evidence bearing upon the matters here urged by the appellant is not contained in the record. However, that may be, the evidence contained in the record amply sustains the findings, conclusions and judgment in so far as this appeal is concerned.

Rule 52 (a) of the Rules of Civil Procedure provides as follows:

> "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

A finding of fact by the District Court is not clearly erroneous so as to justify the Court of Appeals in setting it aside unless it is unsupported by substantial evidence, is contrary to the clear weight of the evidence, or is induced by an erroneous view of the law.

Morris v. Williams,
CCA 8, 149 Fed. (2d) 703;

West v. Conrad,
CCA 9, 182 Fed. (2d) 255;

Western Union Tel. Co. v. Bromberg,
CCA 9, 143 Fed. (2d) 288;

Gates v. General Casualty Co.,
CCA 9, 120 Fed. (2d) 925.

For the primary question to be solved by the lower

Court in its findings of fact and conclusions of law was whether the sales made in the farm unit or department were "had and obtained" on the leased premises, and were to be accounted for to McNair Realty Company and included in the percentage rental. In finding No. IV, (R. pp. 48-51), the Court detailed the various transactions that occurred directly and indirectly in the leased premises. There is no conflict of evidence that such was the case. In its brief counsel for appellant recognized this to be the situation. On page 10 of its brief appellant's position is stated as follows:

> "Part of the activities involved in the sale of farm implements and equipment was carried on at the farm store, and part of the activities involved in such sales were carried on in the department store. It is the plaintiff's contention that *not enough* of those activities were carried on on the department store premises so that the sale of farm equipment came within the provisions of the percentage rental in the lease as being 'had and obtained' on the demised premises."

Again, on pages 21 and 23, we find the following statement:

> "The farm store activities which took place on the demised premises were so few and of such a nature, that they did not affect the income producing activities which the parties intended should become a basis of calculation of net retail sales."

On page 29 there appears the following:

> "We realize that the District Court made a Finding of Fact that the sales made by the farm store were had and obtained upon the demised premises. In fact, the District Court listed various activities of the farm store, which took place on the department store premises. It would be possible for us at this time to list an equally

lengthy number of activities which took place off the department store premises."

Thus, the appellant recognizes that various of the "activities" in connection with the sales of the farm unit or department took place on the leased premises. It takes the position that there were "not enough" of those activities. How much is enough? Appellant seeks to have the lower Court's judgment upon that question set aside in favor of its own. It seeks to have this Court substitute its judgment for that of the District Judge. This may not be done.

> Pacific Portland Cement Co. v. Food Machinery & Co. Corp., CCA 9 178, Fed. (2d) 541;
>
> Manley v. Pacific M. & T. Co., 79 Cal. App. 641, 250 Pac. 710, 713.

We submit that under the evidence and under the theory of appellant, as above set forth, this Court cannot say that it is "left with the definite and firm conviction that a mistake has been committed."

> United States v. U. S. Gypsum Co., 333 U. S. 364, 92 L. Ed. 746.

D. The Sales of Farm Implements and Equipment were had and obtained on the leased premises.

It would seem that Finding No. IV of the Lower Court is a complete answer to the argument of counsel for appellant which appears on pages 23 to 32 of Appellant's brief. However, we shall here, as briefly as possible, address ourselves to the argument there presented.

The present action assumes an ambiguity or uncertainty in the lease between the parties. The evidence is that the lease was prepared entirely by the appellant upon its own

printed form. The provisions of the lease must, therefore, be construed most strongly against the appellant.

Blankenship v. Decker,
34 Mont. 292, 85 Pac. 1035;

Lyon v. Daly C. M. & S. Co.,
46 Mont. 108, 126 Pac. 931;

McDonald v. N. B. Ass'n.,
113 Mont. 595, 131 Pac. (2d) 479;

Letz v. Lampen,
110 Mont. 477, 104 Pac. (2d) 4.

Such is the rule in this Circuit,

N. P. Ry. Co. v. Twohy Bros. Co.,
(CCAA) 95 Fed. (2d) 220, 223;

and in all Federal Courts.

17 C. J. S. p. 751, note 98.

The purpose of the lease is set forth as follows:

"For the purpose of selling merchandise at retail and other business that may be conveniently carried on in connection therewith."

Upon that basis the appellant agreed to pay rental to appellee as follows:

"A rental at the rate of Fifty Four Hundred and no/100 Dollars ($5400.00) per annum payable in equal monthly installments of $450.00 each in advance on the first day of every month during said term beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over Two Hundred Seventy Thousand and no/100 Dollars ($270,000.00) per lease year, had and obtained on the above described premises. No percentage will be paid on wholesale sales to employees or sales or transfers of merchandise to other Gamble stores.

"Should Lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to Lessor. Additional

rental on the above is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and no/100 Dollars ($270,000.00) or on any general wholesale business done as provided for."

That the word "merchandise" comprehends the sale of farm implements and repairs seems too clear for argument.

57 C. J. S. p. 1057 and cases cited.

A sale is the transfer of property for a valuable consideration.

R. C. M. 1947, sec. 74-101.

The location of the property sold is immaterial. Indeed, it may not even be in existence.

The word "had" appears to be the equivalent of "obtained" or "acquired."

Webster New Int. Dictionary.

The word "obtained" apparently means primarily to acquire by effort.

Webster New Int. Dictionary.

Exparte Parker, 11 Neb. 309, 9 N. W. 33;

State v. Miller, 53 Kan. 324, 36 Pac. 751.

The words "on the above described premises" means the building and ground described in the lease.

Under such a lease the obligations of the lessee is plain. In the case of *Selber Bros. v. Newstadt's Shoe Stores*, 194 La. 654, 14 So. (2d) 10, the Court said:

"Defendant (lessee) was required to conduct its operations in plaintiff's premises for the mutual benefit of the parties to the contract, and in a manner consistent with good business principles in order that its lessor would realize the largest possible amount of rent over and above the stipulated minimum of $200.00 per month. The implied obligation of the lease demanded

this; and the plaintiff (lessor) was entitled to and did rely on a performance of that kind."

Such then was the obligation of the plaintiff under the present lease at the time it took possession of the leased premises and at all times thereafter until the lease was terminated.

The general rule under leases such as is here presented is stated in 52 C. J. S. sec. 502 (b), pp. 284, 285, as follows:

> "He (the tenant) cannot by ceasing to operate, or by changing the nature of his business, or by diverting his business to another store which he owns or by moving some departments of the business to other premises escape liability for rent based on the percentage of his profits or sales by paying the minimum amount stipulated."

Citing:

> Mayfair Corp. v. Bessemer Properties,
> 150 Fla. 132, 7 So. (2d) 342;
>
> Selber Bros. v. Shoe Stores,
> 194 La. 654, 194 So. 579;
>
> Goldberg Corp. v. Levy,
> 9 N. Y. S. (2d) 304;
>
> Dunham & Co. v. Realty Co.,
> 134 N. J. Eq. 237, 35 Atl. (2d) 40;
>
> Cissna Loan Co v. Baron,
> 149 Wash. 386, 270 Pac. 1022;
>
> Seggebruch v. Stosor,
> 309 Ill. App. 385, 33 N. E. (2d) 159.

The facts in the case of *Cissna Loan Co. v. Baron*, (Wash.) 270 Pac. 1022, Supra, are very similar to those here presented. In that case the plaintiff was the owner of "The Fair Department Store." It sold its stock of

goods as a going concern to the defendant and leased the building in which the store was located to the defendant. As rental the defendant agreed to pay to plaintiff "2½ per cent of the gross sales of said department store business conducted and maintained by second part *in said building* during the preceding calendar month." Thereafter the defendant leased the second floor of an adjacent building, opened the wall between the two buildings and moved several departments of the store into the adjacent building. Defendant refused to pay the 2½ per cent on sales made from such departments. Plaintiff sued for such percentage. In upholding a judgment for the plaintiff the Supreme Court of Washington said:

> "The monthly rental to accrue to respondent is, according to the lease, to be computed at a percentage of the gross sales of the department store business conducted and maintained by appellant 'in said building' during the preceding calendar month. Appellant contends that the lease is to be construed in favor of the lessee and against the lessor, Gates v. Hutchinson Investment Co., 88 Wash. 522, 153 P. 322; Salzer v. Manfredi, 114 Wash. 666, 195 P. 1046; and that consequently it must be held that respondent is not entitled to any percentage of the gross sales of merchandise sold in the McArthur building. It appears that during the month of April, 1927, the gross sales of merchandise from respondent's building amounted to $4,572.83, and from the McArthur building to $2,928.70; for the month of May the sales from respondent's building amounted to $5,335.25, and from the McArthur building to $2,856.80. It appears from these figures that the two departments moved to the McArthur building were important departments, and that the sales therefrom amounted to a considerable portion of the total sales made by the department store. When appellant moved these departments into the McArthur building, appellant

somewhat enlarged the space on the balcony theretofore devoted to the business office of the store, a necessary part of the business, but a department which did not engage in the selling of merchandise.

"In our opinion the trial court was correct in giving the instruction of which the appellant complains. Respondent turned over to appellant a going business, a department store, including the two important departments now located in the McArthur building. Customers now obtain access to these departments by going through respondent's building, using the stairs or elevator therein, the goods are displayed in respondent's show windows, and the entire business is administered and 'conducted' within the demised premises.

"Appellant is conducting one business only, that of 'The Fair Department Store,' and is bound to pay as rent for respondent's building the agreed percentage of the gross sales of the 'said department store business.' Appellant contends that the words 'in said building' relieve him from paying any percentage on the gross sales made from the second floor of the adjoining building; but it is perfectly clear that at least a considerable portion of the 'business' of selling the goods contained in the McArthur building is actually conducted in respondent's building. Respondent sold to appellant a business, a going department store; he is to receive under his agreement with appellant, as rent for his building, a percentage of the gross sales of the 'business.' The entire business administration, the advertising, the going to and fro of the patrons of the store, is conducted in respondent's building, and we are clearly of the opinion that respondent is entitled to receive the agreed percentage on the gross sales made from the departments located in the McArthur building."

The facts of the above case with the uncontradicted facts here presented are surprisingly similar. A comparative statement is as follows:

Cissna Loan Co. Case

1. Rental provided for payment of 2½ per cent of gross sales of department store business conducted and maintained by lessee "in said building."
2. Tenant leased space in adjacent building for use of certain departments of store.
3. The entire business was conducted as "Fair Department Store."
4. The entire business administration was conducted in lessor's building.
5. All advertising directed patrons to lessor's building.
6. Patrons came to lessor's building and were there directed to departments in adjacent building.

McNair Realty Co. Case

1. Rental provided for payment of minimum rental plus 2% of net retail sales above $270,000.00 had and obtained on the above described premises.
2. Tenant leased lot and building across alley for use as warehouse and thereafter installed farm department therein.
3. The entire business was conducted as "Gamble Store."
4. The entire business administration was conducted in 521-523-525 Central Avenue.
5. All advertising directed patrons to 521-523-525 Central Avenue.
6. Patrons came to 521-523-525 Central Avenue and were directed to farm department across alley.
7. There was but one telephone—that at 521-523-525 Central Avenue.
8. The money from all sales came to the business office at 521-523-525 Central Avenue.

9. All credit sales were approved and concluded at the business office in 521 - 523 - 525 Central Avenue.
10. The farm unit was in every way treated as a department of Gamble's Store.
11. Farm implements were actually displayed and sold in the Central Avenue Store.
12. The entire business was under the supervision of one manager.

There can be no question here but that under the authorities the appellee was clearly entitled to a percentage of 2% on all farm sales.

To avoid the impact of the decisions as applied to the undisputed facts, counsel for the appellant attempt to advance the following theories:

(a) A farm department was not contemplated at the time of the execution of the lease.

There is, of course, testimony in the record that the appellant did not contemplate selling farm machinery, implements and repairs when the lease between appellant and appellee was negotiated or on December 27th, 1943, when it was executed. Indeed, it appears that during that period the appellant was nowhere engaged in the sale of such merchandise and did not have as a part of its operations a farm department. However, we are unable to see exactly what bearing these facts have upon the question

before the Court. Farm implements and repairs are merchandise beyond question. In the course of the business of the appellant the sale of such merchandise was treated exactly the same as the sale of any other merchandise. The retail sales of farm implements and repairs was reported by the Great Falls store in exactly the same fashion as the sale of dry goods or washing machines. Such sales were carried into the store records which were introduced in evidence as Exhibits 27 and 28 exactly the same as any other sales.

The evidence is that prior to the execution of the lease there was no discussion regarding the sale of any particular items and no discussion with respect to the operation of a lunch counter. (R. pp. 291, 292). Both parties correctly assumed that the percentage rental should be based upon the net retail sales of all merchandise. This was recognized by the "General Counsel" for the appellant in his letter to defendant dated November 15th, 1948, in which he gives, as the only reason for not including farm sales in figuring the percentage that "the farm store is entirely a separate unit, it carries its own inventory, none of which is located on your store property which we are corresponding about and, therefore, such sales do not constitute sales on the leased premises covered by our store building lease and for that reason there is no point in reporting the sales of the farm store to you." (R. p. 280).

(b) It was physically impossible to operate the farm store on the demised premises.

In a discussion of this phase of appellant's argument,

we must first ascertain the meaning of the word "operate." In the case of In re Owl Drug Co., (D. C. Nev.), 21 Fed. Suppl. 907, 910, the Court said:

> "To 'operate' means to put into, or to continue in operation or activity, to manage, to conduct, to carry out or through. This is both the ordinary and the legal definition of the word. See Webster's New International Dictionary; 6 Words and Phrases, First Series (1904) pp. 4989 et seq.; 3 Words and Phrases, Second Series (1914) pp. 743 et seq.; 5 Words and Phrases, Third Series (1929) pp. 629 et seq.; 2 Words and Phrases, Fourth Series (1933) pp. 864 et seq. The new Shorter Oxford English Dictionary defines it as follows: 'To direct the working of, to manage, conduct, work (a railway, business, etc.); to carry out, direct to an end (an undertaking, etc.); chiefly U. S. 1880.' Volume II, p. 1374.
>
> "The operation of a business implies its conduct and management not sporadically, but continuously over a definite period of time, with one aim—profit making."

That the farm unit business and management was conducted from the leased premises is beyond question. That its income was the Gamble-Stores income is conceded. That its profits were credited to and its losses absorbed by the general operations is clear. (See Finding No. IV, R. pp. 48-51).

If counsel means that it was physically impossible to have the farm merchandise on display in the department store, then our answer is that such physical presumes is not necessary. In many businesses sales are by catalog or by sample. The actual merchandise is not on display and perhaps is not in existence. Nevertheless a business is being conducted or operated, sales made and profits accrued. But, actually, farm merchandise was displayed in

the department store premises. (R. pp. 353, 357). And see the advertisements set forth in exhibits 8 to 15, inclusive, which have been certified to this Court.

E. The Appellee did not accede to a construction of the lease to the effect that farm sales were not to be included within the rental and accounting provisions of the lease.

Counsel for appellant appear to argue, (Brief, pp. 36 to 40) that appellee acceded to such a construction of the lease because it leased the First Avenue Warehouse property on a flat rental basis.

This assertion, of course, simply begs the whole question. The First Avenue North property was rented by appellant from the appellee long before any "farm department" was set up or contemplated by the appellant. The property was leased for *storage and warehouse purposes* in conjunction with the operation of the store on Central Avenue. It appears at the outset to have been used for just that purpose and no other. Indeed, up until the time of the trial the warehouse was being used for the storage of furniture and other items which were being sold in the Central Avenue store. (R. p. 116). So long as no merchandise was being sold from the warehouse or lot in connection with appellant's store operations in Great Falls there could be no net retail sales or wholesale sales upon which a rental could be figured, and the minimum rental of $60.00 or $90.00 per month applied. When, however, the appellant departed from a mere storage of merchandise and set up a store department on the First Avenue property through which large quantities of merchandise was sold a wholly different situation arose.

Counsel for appellant would hardly have the temerity to suggest that it would have the right to move all of its washing machines, radios, and hardware out to the First Avenue property, set up a Unit 6 as a hardware and furniture department, sell such merchandise, as the farm implements were sold, as a part and parcel of the general store operations, and not report such sales under the percentage agreement. We can see no difference between such an assumed situation and the methods used by the appellant in its operation of the farm department. Certainly under the facts hereinbefore detailed with reference to such operations there can be no difference in law.

How the acceptance of a flat rental upon property rented for warehouse and storage purposes could act as a construction or interpretation of the lease of December 27th, 1943 is not clear. There is no evidence in the record that appellee knew on June 8, 1948, when it wrote appellant increasing the flat rental on the warehouse property, (R. p. 324), that appellant was not accounting for its farm unit sales. The constant reiterated demands made by the appellee for an accounting of farm unit sales emphatically show that appellee never acceded to appellant's so-called construction of the lease. (See Exhibit 3, R. p. 189; Exhibit 4, R. p. 192; Exhibit 16, R. pp. 261, 267, 268, 269, 270, 273, 280; Exhibit 26, R. pp. 348, 349).

Finally, it is suggested by counsel for the appellant, (Brief, pp. 34 to 36) that the appellant placed a "practical construction" on the lease with respect to the payment of a percentage on the sales of the farm department. This theory is advanced because Mr. Hill, the real estate man

for appellant, testified that "the general Company policy was to establish all of those farm stores as separate stores." (R. p. 169). There is, of course, no evidence that this "policy" was ever discussed with or agreed to by the appellee prior to December 27th, 1943, or at any time. What counsel overlooks entirely is that the First Avenue property was never leased as a place for a farm store, *but was leased purely and simply as a warehouse for storage purposes only*. The appellant had no Unit 5 or farm department in Great Falls at that time. (R. p. 168). How then could there be any policy on the part of the appellant with respect to farm stores which could be applied to the lease of December 27th, 1943, or the renting of the First Avenue property in 1946? Furthermore, a general policy of the company, could hardly amount to a "practical construction" of the lease of December 27th, 1943 when, (a) the appellant was not then in the farm implement business at all, (R. p. 168), and (b) the policy, if any, was never communicated to or agreed to by the appellee. (R. p. 367).

Counsel for the appellant appear to argue that because all of the rentals paid in connection with the storage and sales of farm implements plus 2% on sales would amount to 4.68% of net sales this Court should hold that the sales in department 5 are not within the percentage arrangement. The appellee, of course, has no control over property rented by appellant for unloading farm machery from railroad cars or for property used in setting up such machinery or storing it. If the rental paid is considered from a storewide standpoint, it would amount to not much more than 2%. There is no reason why it should

not be. The warehouse was used for the storage of furniture, tires and other items which should carry a part of the burden of any flat rental. These items were all a part of the stock of Department 1. For bookkeeping purposes that department should be charged therefor. It must be remembered that all the testimony regarding costs, rentals, profits, et cetera, with respect to Department 5 is merely bookkeeping testimony and has little or no regard to actual facts. (R. p. 132).

F. There was no tender of delinquent rentals at any time prior to March 6th, 1951.

There was here no "tender of full compensation." There was a compromise offer of $5,161.60 made during the negotiations of October 24 to 28, 1949, (R. pp. 198-202) but no money was paid and the offer was not kept good.

Section 58-423 Revised Codes of Montana, 1947, provides:

> "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor."

This statute was not followed.

The so-called "tender" of the plaintiff had conditions attached to it—that the lease of December 27, 1943, was to continue in effect. (R. pp. 200, 201). Such an offer is not a tender.

> Advance Thresher Co. v. Hess,
> 85 Mont. 293, 301, 279 Pac. 236.

It is true that Hill testified that appellant was "ready, willing and able to make full compensation for that rent with interest, costs and damages." (R. p. 179).

His authority for making such a broad offer would appear to be problematical. He testified, (R. pp. 179, 180):

"Q. May I see your authority for making that statement, Mr. Hill, please?

"A. My authority?

"Q. Yes.

"A. I can't show you anything in writing, Mr. Hall.

"Q. Well who authorized you to make that statement?

"A. Gamble-Skogmo, Inc.

"Q. And who in that corporation authorized you?

"A. W. P. Berghuis, E. Pennock, W. J. Larson.

"Q. Mr. Berghuis is general counsel of the corporation, is he not?

"A. That is correct.

"Q. And who is Mr. Pennock?

"A. He is one of the Vice Presidents.

"Q. And who is the other?

"A. W. J. Larson.

"Q. Yes.

"A. He is also one of the Vice Presidents in charge of operations.

"Q. But you have nothing in writing from the corporation in connection with that matter?

"A. No, I do not.

"Q. That is purely oral statements made by these officers to you?

"A. Yes, sir, that is correct."

Even assuming Hill's authority his statement did not constitute a tender, but at most was an offer to compensate in the event of an adverse decision. (62 C. J. 654,

655). No money was tendered or deposited in Court prior to March 6, 1951, nor was any bond given to show appellant's good faith. The facts of the matter are that in so far as appellant is concerned there has been a callous indifference to the rights of appellee and an entire lack of good faith or equity on its part.

G. The Appellee did not waive its right to an accounting of farm unit sales or to payment of the 2% rental thereon, or to its right to terminate the lease.

It is next suggested by counsel for the appellant that by reason of appellee's acceptance of the percentage rental without the inclusion therein of the percentage on sales from the farm department it is now precluded from claiming that it is entitled to any percentage on such latter sales. This might be true if the appellee had accepted the payments made by appellant as payment in full. That the appellee at no time did so is clear from the evidence.

During the summer of 1948 the appellee, for the first time learned that sales from the farm department were not being included in the accounts rendered by appellant and that such sales were not being used in calculating the percentage due appellee. The President of appellee learned the above quite through accident and in a discussion with Dale Cockayne, the manager for appellant. (R. p. 289). Cockayne, on or about July 6th, 1948, furnished appellee with figures showing retail sales for the period March 1st to May 31st, 1948. (R. p. 257). These figures disclosed total sales of $239,112.29, and farm sales of $64,398.63, but the figures finally reported by appellant for such period, after many demands and complaints from defendant, was only $169,454.01. (R. p. 264).

On July 17th, 1948, the matter of farm sales was called to appellant's attention by appellee. (R. pp. 260, 261). This was ignored. On September 4th, 1948, it was again called to appellant's attention, (R. p. 267), and again on September 20th, 1948. (R. p. 268). Finally on September 27th, 1948, appellant replied. (R. p. 269). Appellee answered on September 29th, 1948. (R. p. 190).

Again, on October 28th, 1948, the matter of farm sales was referred to by appellee, (R. p. 273) and was ignored by appellant's General Counsel. (R. pp. 275-278). Again, on November 9th, 1948, appellee wrote concerning the matter. (R. pp. 191-193). This letter was answered on November 15, 1948. (R. pp. 279, 280). Finally, on March 30, 1949, the appellee wrote appellant as follows, (R. p. 348):

"This will acknowledge your two letters of December 30, 1948, and March 25, 1949, enclosing checks for $2,862.07 and $2,017.30, respectively.

"These letters purport to be sales reports for certain quarterly periods. As letters they are interesting but they scarcely constitute reports such as we are entitled to.

"Furthermore, the total figures contained therein are extremely disappointing. We still have to point out to you that no report is made as to so-called farm sales and that if such figures have been included in the totals given in your letters then these totals are increasingly disappointing.

"We are crediting your account with the checks in question as being simply payments on account.

"As we have done before, we here and now make formal demand upon you for fully certified sales statements, and for the additional sums due as shown by such statements.

"If these are not forthcoming, properly made up, showing your sales by departments for the periods in question, on or before May 1st, next, we will turn the matter over to our attorneys with instructions to them to ask the courts to terminate your lease."

There was no response of any kind to this letter.

Thus, during the period July 17th, 1948 to March 30th, 1949, appellee called this matter to appellant's attention on seven different occasions, and finally advised the appellant on March 30th, 1949, that unless proper accountings, including farm sales, were submitted a termination of the lease would be requested. Demand was made for the payment of the additional sums due. (R. p. 348). There was no response, and on October 3rd, 1949, the lease was terminated. How, under such circumstances, there could be a waiver is not clear. There certainly was no waiver before July, 1948, for appellee did not know that appellant was omitting farm sales in its accountings to appellee. Certainly the appellee was consistent in its demands thereafter. The amount due the appellee amounting to 2% of the sales made in the farm department was a certain and liquidated amount known to the last cent by the appellant at all times through its daily reports. There was at no time any dispute as to the amount due the appellee. The dispute, if it can be called such, was whether in any event appellee was entitled to a percentage on the farm sales. There was here no waiver on the part of the appellee of its right to claim such percentage. The case of *In re Diversey Bldg. Corp.*, 90 Fed. (2d) 703, is cited by counsel for plaintiff upon the theory of waiver. *But in that case the lessor had knowledge of the failure to pay and*

had continued to deal with the lessee for nearly three years thereafter without objection. (Appellee's Brief, p. 33). Such emphatically is *not* the situation here. There was here first a lack of knowledge and thereafter continuous objections.

The lease required a quarterly accounting of (a) net retail sales; and (b) wholesale sales.

Net retail sales "are gross retail sales less returned merchandise or returned merchandise sold on contract." (R. p. 95).

No such accounting was ever made by the appellant to appellee, and complaints on the part of the appellee were almost continuous. (R. pp. 221-275).

The first lease year commenced March 1, 1944. There was no accounting at all until November 28, 1944, (R. p. 222) and then only on demand of appellee. (R. p. 221). A statement for the three quarters ending August 31, 1944 was made January 15, 1945. (R. p. 226). The appellant maintained that the quarterly accounts related only to wholesale sales, (R. p. 228) and appellee complained about that construction of the lease under date of June 11, 1945, (R. p. 228), and again requested a quarterly accounting, (R. p. 229). A statement was finally sent on July 2, 1945. (R. p. 230).

For the first two lease years ending February 28, 1946, the plaintiff reported sales under $270,000.00 for each year so that the percentage clause did not apply. (R. pp. 230, 233).

Demand was made on July 12, 1946, for the first quarterly accounting for the quarter ending May 31, 1946.

(R. p. 238). A statement was finally sent July 26, 1946, (R. p. 239), but no check was enclosed. (R. p. 241). Another request was made for an accounting for the quarter ending August 31, 1946. (R. p. 243). This was forthcoming November 1st, 1946. (R. p. 244). The statement of sales for the quarter ending November 30, 1946, was sent January 20, 1947. (R. p. 244). An overall statement for 1946 to March 1, 1947, was sent April 22, 1947. (R. p. 245). On January 5, 1948, demand was made for the quarterly accounting for the quarter ending November, 1947. (R. p. 251). This report finally came January 21, 1948. (R. p. 253). On July 6, 1948, July 12, 1948, and August 3rd, 1948, the appellant sent false reports covering sales concerning which appellee emphatically complained, (R. pp. 256-262). Finally, on March 30, 1949, appellee wrote appellant as hereinbefore set forth.

Under the facts it is difficult to see how it is possible for appellant to take the position that through inaction the appellee had waived its right to a quarterly accounting. Such a position simply does not have any basis in fact. The appellant throughout the period March 1, 1944 to October 1, 1949, simply ignored appellee's demands and in a high handed manner delayed reports indefinitely and made absolutely no accounting to the appellee. Counsel for appellant suggest that the appellee could have gone to the store records and obtained its information. But the lease does not require the appellee to carry this burden. A plain obligation was written into the lease by the appellant requiring appellant to furnish quarterly to appellee an accounting of retail and wholesale sales. This it refused

to do and it must take the consequences of that refusal.

We are not entirely clear as to just what appellant's theory is with respect to the argument appearing on pages 46 and 47 of its brief. The appellee did accept, under protest, the checks sent to it by appellant, but only as part payment of the rental due. The appellant was in possession of the Central Avenue property and the First Avenue property. There was no default claimed so far as the rental of the First Avenue property was concerned. That property was rented for storage purposes and was used for that purpose up to the time of trial. The default was in not accounting for or paying the full amount due on the percentage of sales under the lease of December 27th, 1943. Certainly acceptance, under protest, of a part of the rental due, does not constitute a waiver of the default in not accounting for or paying the full amount unless there is an executed agreement to that effect.

Section 58-501, Revised Codes of Montana, 1947, provides:

> "An accord is an *agreement* to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled."

See:

> Nelson v. Young,
> 70 Mont. 112, 117, 224 Pac. 237.

There was no such agreement here and there was no waiver.

Of course, the decision cited by counsel for appellant is not in point here. The case of Woollard v. Schaffer Stores Company, Inc., 272 N. Y. 304, 5 N. E. (2d) 829, 109 A. L. R. 1262 holds that "the acceptance of rent by the

landlord, after the acquisition of knowledge by him of a violation of the terms of the lease in subletting without the landlord's written consent, constitutes a waiver of the forfeiture."

With such holding we have no quarrel. But here the plaintiff has failed to pay more than $5,100.00 due as percentage rental for the property occupied by it. Part of the rental has been paid and accepted "on account" under protest. In the Woollard case the full rent due was paid and accepted. That is not the situation here. If counsel's theory were correct then the minimum rental of $450.00 could have been paid by appellant and if the checks were accepted "on account" and under protest, nevertheless all that appellee could do would be to sue for the delinquent rental. But that is not what paragraph 16 of the lease says in clear and emphatic language.

In the case of *Title & Trust Co. v. Durkheimer Inv. Co.,* (Ore.) 63 Pac. (2d) 909, 915, the court said:

> "A covenant to pay rent is a continuing one, to which the doctrine of waiver does not apply. The lessor of real property will not be estopped to claim the right of possession of the premises for nonpayment of rent simply because he permits defaults to be made and to continue for a time as to such payments. Francis Bros. v. Schallberger, 137 Or. 529, 536, 3 P. (2d) 530, 83 A. L. R. 108; Jones, Landlord & Tenant, §§ 499, 500; 1 Underhill, Landlord & Tenant, p. 649."

The minimum rental was due on October 1, 1949. On March 30th, 1949, appellee had finally advised appellant that future rent checks would be accepted only on account and that appellee was going to take steps to terminate the lease. (R. p. 348). The payment of $450.00 by appellant

on October 3rd did not make up the delinquency and was not intended to do so.

In re Wil-low Cafeterias,
94 Fed. (2d) 306, 309;

Sproul v. Help Yourself Store Co.,
16 Fed. (2d) 554.

It must be further borne in mind that the lease specifically provides that the right to terminate is "without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants."

This clause can only mean that appellee may demand, sue for, recover and accept delinquent rentals or payment on rentals without prejudice to its right to terminate.

In the case of Miller v. Reidy, 260 Pac. 358, relied upon by counsel for appellant in their brief, (p. 49), there was a full payment of the "rents specified in the lease." Not so here under the evidence. Again, we have a case where there was a breach of a covenant against subletting. Such a covenant is not a continuing obligation such as we have here.

There was and is no waiver of the right to terminate the lease.

H. The Appellee did not demand payment of a percentage on farm unit sales to October 19th, 1949.

On page 52 of appellant's brief appears the following statement:

> "On examination of all of the evidence pertaining to the negotiations will show that during the period of time from October 24th to October 28th, 1949, the defendant continually demanded the sum of $5,161.60."

This statement requires a discussion of what took place between October 24th and October 28th, 1949. On October

25th, 1949, Carter Williams, representing the appellant, offered to pay to appellee 1% of all farm sales to date. This was refused. In a discussion it was stated by those representing the appellant that 2% of the farm sales, as of October 19th, 1949, amounted to $5,161.60, and this amount was offered and accepted as the correct amount. Chester McNair testified, (R. p. 345):

"Q. Now do I understand, Mr. McNair, at no time during the conferences held between you and Mr. Hill that there was any agreement on his part to pay this $5,161.60?

"A. He agreed to pay that.

"Q. Well was that an actual agreement to pay or was it a tacit agreement to pay, something you understood?

"A. I know that was agreed to be paid.

"Q. And was that amount accepted by you in settlement of the percentage rentals upon the farm sales?

"A. Yes.

"Q. For the period 1947, 1948 and 1949 down to October 19th?

"A. Yes.

"Q. Now during your cross examination you were asked whether or not you made any demands upon the plaintiff with reference to the percentage claimed due on wholesale sales and I believe you said you had made no such demand?

"A. For a fixed figure.

"Q. That is right?

"A. No.

"Q. And why was no such demand made?

"A. Because we had no way of fixing a figure. We made demands but not for a fixed figure."

The appellee at no time demanded or requested any fixed figure because it was not in any position to do so. The figure of $5,161.60 was furnished by appellant and agreed to by both parties as the amount appellant was willing to pay and defendant was willing to accept.

I. Conclusions.

For the reasons hereinabove set forth, it is respectfully submitted that the judgment and decree, in so far as the appeal of Gamble-Skogmo, Inc. is concerned, should be affirmed, and the appeal dismissed.

Respectfully submitted,

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Service admitted this.....day of September, 1951.

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